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CURRENT TOPICS

The Late Sir Gervais Rentoul

SIR GERVAIS RENTOUL, K.C., the West London metropolitan police magistrate, who died on 7th March, at the early age of sixty-one, was a beloved and lovable figure. A man of great attainments, a scholar of the Royal University of Ireland, and the holder of a first-class honours degree in the Oxford Law Schools, he never paraded his learning, but succeeded in living according to the best principles of humanism. He was justly described as a defendants' magistrate, and he more than once expressed his view that the railed dock should be abolished, on the ground that it was inconsistent with the presumption of innocence. He was called to the Bar at Gray's Inn in 1907 and specialised in criminal and licensing work; he became counsel for the Inland Revenue in the latter class of work. From 1922 to 1934 he was Conservative M.P. for the Lowestoft division of Suffolk and in 1930 he took silk. One of his best-known cases when at the junior bar was that of *R.* v. *Seddon and Seddon*. Sir Rufus Isaacs, K.C. (Attorney-General) appeared for the Crown, with Richard Muir, S. A. T. Rowlatt and Travers Humphreys, a formidable array, and Marshall Hall, K.C. had the assistance of Robert Ormston and Wellesley Orr for the defence of Seddon. Gervais Rentoul's unaided defence of Margaret Ann Seddon secured her acquittal. He was an interesting writer, and the legal reforms he advocated in 1940 in his recollections, "Sometimes I Think," showed him to be much in advance of his time. Those who attended the twelfth Haldane lecture, which he gave on the 12th June, 1943, on "The Art and Ethics of Advocacy," will recall that he was also an interesting talker, and possessed to the full that art of gripping his audience's attention which he recommended to the aspiring advocate. We mourn a great man who has gone before his time.

The Worshipful Company of Solicitors

IN Newsletter No. 2 issued in February by the Worshipful Company of Solicitors of the City of London it is stated that there are now 177 liverymen and 103 freemen. An interesting point is that the company is almost unique amongst the livery companies, since its members must always be members of the "craft," and no one not a solicitor can become a member, even by patrimony. Among "Personalia" it is noted that the Master has been appointed Chairman of the Reception Committee in charge of the arrangements on the occasion of the presentation of the Honorary Freedom of the City to Field Marshal VISCOUNT ALEXANDER (Governor-General Designate of Canada) on 19th March, 1946. Mr. G. J. CULLUM WELCH, O.B.E., M.C., C.C. (a member of the livery), who has been elected Chairman of the City Lands Committee of the City becomes Chief Commoner and Spokesman of the Court of Common Council to which he was elected for the Ward of Candlewick in 1931. St. Yves was selected as a Patron Saint. St. Yves (1253–1303) was born at Trequier and studied law at Paris and Orleans. His gratuitous services to the needy and oppressed earned him the title of "Advocate of the Poor," and he treated orphans and widows as his most important clients. Becoming an ecclesiastical judge, he was widely esteemed for his impartiality and championship of the poor. He was ordained priest in 1285 and died at Lonnanec (where he had been curé for many years) on 19th May, 1303. He was canonised in 1374 and is generally regarded as the Patron Saint of lawyers. His festival is kept on 19th May. All the company's records were destroyed by enemy action, but a list dated 1909 lent by one of the founder-members contained 159 names, and it is interesting to note that no fewer than twenty-seven of these founder-members lived to see the grant of the livery thirty-five years later. LORD HEMINGFORD is the only surviving honorary associate.

War-Service Exemption for Articled Clerks

THE Council of The Law Society asks, in the February issue of the *Law Society's Gazette*, that members who have articled clerks should pay attention to the following points: Subject to the minimum aggregate of two years' service in articles, service in H.M. Forces may be reckoned as part of service under articles (Solicitors (Emergency Provisions) Act, 1940, s. 3 (*a*)). The Council's practice is to grant the maximum concession possible where application is made under this section, and allows articled clerks with war service to make up after their war service the minimum period required by the section, subject to further articles being entered into when the original period of articles has expired. The stamp on further articles is 10s. and they must be lodged at the Society's office for registration, together with a declaration as to their due execution, the original articles, and the registration fee of £1. Service by an articled clerk whilst he is not bound under articles cannot count towards the statutory period. Applications to the Council under s. 3 (*a*) should be made as soon as possible after either the term of articles has expired or after the clerk's release from national service, so that they may know what period of further articles will be required, and be enabled to commence the period of further articles at as early a date as possible.

The Recidivist

PRACTITIONERS in the courts of quarter sessions and assizes in this country are still familiar with the tragic figure of the recidivist, the incurable criminal who has spent a lifetime in a succession of prison sentences. No more eloquent testimony

of the imperfections of criminal law enforcement throughout the world can be found than in this class of criminal. Sir GERALD DODSON, Recorder of the City of London, in a preface to "The Treatment of the Recidivist in the U.S.A." published at the beginning of this year by the Canadian Bar Association under the auspices of the Department of Criminal Science of the Faculty of Law in the University of Cambridge, observed that in this country there has been a marked departure from the principle of increased severity for repeaters, in an endeavour to find a more enlightened way of dealing with them. He wrote that the well-intentioned Prevention of Crime Act, 1908, has fallen into disuse, for "at the moment of writing there are not more than forty persons in this country serving such sentences." To-day, he added, the method generally adopted by the judges is to punish a man only for the offence or offences then before the court, and not upon his past record. Nothing in the nature of sterilization has ever been adopted. Sir Gerald said that he had long felt that the extension of the probation system might achieve excellent results. "Dazed by a new contact with an unfamiliar world," the recidivist or "old lag" needed literally to take the hand of the probation officer until he could walk alone. Perhaps, Sir Gerald added, a Government hostel would be required at first for board and shelter, and many other details would require working out. The life-lines of the first offender were not cut away; those of the recidivist are rotted away, and he needed to be provided with new ones if any recovery was to be made. Detention on the camp principle, Sir Gerald suggested, where useful occupation could be provided, would protect society and at the same time arrest total disintegration of moral fibre. Perhaps, as Sir Gerald said, the matter will receive attention when the Criminal Justice Bill of 1938 is revived. Meanwhile, so long as there are judges of the vision of Sir Gerald Dodson, the people will not perish.

Control of Civil Building

THE Ministry of Health circular 50/46 to local authorities, dated 6th March, 1946, states that local authorities continue to be responsible for the licensing of the following classes of civil building work: (*a*) all work costing not more than £100, whether connected with new houses or not, provided that such work is not within the "free" limits of £10 and £2 per month; (*b*) all housing work costing over £100 which will provide new or additional dwelling accommodation, including the repair of war damage to unoccupied houses, and work required under statutory notice. In accordance with the provisions of the Control of Building Operations (No. 6) Order, 1946, the same "free allowances" as have been in force from the 1st August, 1945, to the 31st January, 1946, will continue in force until the 31st July, 1946, viz., work may be done without a licence on any single property, if its cost, together with the cost of any other work done on the property during the period, does not exceed £10; and in addition, work costing a total of not more than £2 in any one month during the period, may be carried out without a licence. This £2 monthly allowance is non-cumulative. In computing the cost of work in the case of premises occupied wholly or partly as a private dwelling, or of premises being constructed, reconstructed or altered for occupation wholly as a private dwelling, the services of any person who does not receive any payment or other valuable consideration for these services, and the cost of any materials exclusively used by that person, are disregarded. Applications for licences must be considered in relation to their possible effect upon building of new houses by local authorities. Licences should be issued only when the authority are satisfied that the applicant is in a position to start work on the number of houses covered by the licence at once. The Minister has decided that local authorities should be empowered to issue a licence for the erection of a new house where the overriding maximum price exceeds £1,200 or £1 300, as the case may be (or the corresponding current maximum for smaller houses) where the cost of the developed site is materially and unavoidably in excess of what is normal.

Licences for Maintenance and Repair

The circular states that in dealing with applications for licences for maintenance and repair, housing work should have first priority, and within the sphere of housing, preference should be given to works required by statutory notice, and to other repairs or essential alterations designed to improve the standard of accommodation, including necessary war damage repairs. Licences should not be granted for relatively less essential work, such as the erection of private garages, porches, verandas, glass-houses, boundary-walls or alterations and decorations to business premises, including public-houses, unless there is special and convincing proof of need. As regards outside painting, licences should not be granted unless the work is clearly needed to prevent serious deterioration or there happens to be a temporary surplus of painting labour for which employment must be found. Local authorities should be on their guard against allowing licences for small jobs merely because they are small. As regards the issue by the local authority of bulk licences for routine maintenance work in respect of premises where not more than £100 is spent in any period of twelve months, it does not appear to have been generally understood that the work to be covered by such licences is restricted to small day-to-day jobs necessary to maintain the fabric of the building, and does not include outside painting work or any interior decoration, save distempering of kitchens, bathrooms, lavatories and public waiting rooms. The amount of maintenance work which should be allowed in any period of twelve months should be related strictly to the size and value of a building and the use to which it is put. In the case of ordinary dwellings and small business premises the free limits of £10 per half-year plus £2 a month, should normally be sufficient for routine maintenance work.

A General Interim Development Order

IN circular No. 21, issued to planning authorities and committees by the Ministry of Town and Country Planning, on 8th February, 1946, a brief explanation is given of the Provisional Town and Country Planning (General Interim Development) Order, 1946, which came into force on the 1st day of February, 1946. The order incorporates much of the 1945 order without change, but an important alteration is made under which, with the exception referred to below, general powers of control may be exercised over surface mineral working and over the deposit of waste materials and refuse. All surface working of minerals is now removed from the category of permitted development, save that the continued working in a normal manner for a period of not more than eighteen months of any existing quarry is authorised by the order. If there are special reasons in any area or in a particular case for such continued working to be controlled, this can be provided for with the Minister's approval by a direction under art. 5 or art. 6. If the land proposed to be worked has already been the subject of an interim development decision, the existing position under that decision is not affected. The deposit of waste materials or refuse in connection with the working of minerals is made subject to control except where the development was being carried out on land used for that purpose on the 1st January, 1946. The permitted development to which this exception relates may now, however, be brought under control if necessary by a direction under art. 5 or art. 6 (1). The Minister proposes to consult at once with the Associations of Local Authorities and also with the Associations of Mineral Producers, and to issue as soon as may be a further circular with regard to special arrangements for the smooth working of the control in particular circumstances. The order contains savings for certain directions already made, which continue to have effect, and also enables directions under art. 5 to be approved by the Minister with modifications, instead of requiring a fresh direction to be made by the authority where the Minister wished to modify a direction.

PLEADINGS IN THE COUNTY COURT

(CONTRIBUTED)

THE discussion on this subject in the "Landlord and Tenant Notebook," of 22nd December, 1945, and "A Conveyancer's Diary," of 9th February, 1946, is one of some interest to practitioners in the county court. It would perhaps be stretching the general opinion too far to suggest that much support could be found for the view, quoted in "A Conveyancer's Diary," that in county court work the absence of pleadings is a virtue. But it is submitted that the rules are not so deficient in helpful provisions or so needful of elaboration on this subject as is suggested in "A Conveyancer's Diary."

It would be burdensome to require, by rule, in every county court action or matter a set of formal pleadings on or resembling the High Court design, as prescribed in R.S.C., Ord. XIX, even if the provisions thereof can be deemed to be incorporated into county court procedure (as seems to be suggested, but, it is submitted, erroneously) by the operation of s. 100 of the County Courts Act, 1934. It would be impossible to conduct the bulk of county court business on the general principle that you are deemed to have admitted everything alleged against you which you have not expressly denied in a prescribed manner at a prescribed time. What is needed is a system that is sufficiently flexible to cope, at one end of the scale, with litigants in person making or disputing simple claims about which they do not need to be told anything, and, at the other end, a cause of some complexity of a Chancery flavour in which the aid of Counsel is seemly even in the preliminary stages.

Every plaintiff must specify "his cause of action and the pecuniary or other claim which he seeks to establish" (Ord. VII, r. 1 (1)), and he must furnish what the court thinks are "sufficient" particulars, on pain of being deprived of costs if he fails to do so (*ibid.*, r. 10 (2)).

The court officials can, and often do, exercise some supervision over the adequacy of particulars of claim. In ordinary money claims, they can see that a reasonable measure of detail, e.g., as to dates, etc., is furnished. They can obviously ensure that such provisions as Ord. VII, rr. 6 and 7, are normally complied with; but, as is shown in the "Landlord and Tenant Notebook," part of Ord. VII, r. 3, is not so easy to deal with. Moreover, any tendency to laxity in this respect can be assailed by defendants by demands for further and better particulars (Ord. VII, r. 9); and by the court by the free use of the costs weapon in Ord. VII, r. 10 (2).

It can only be in a very benevolent spirit that the considerable non-observance by defendants of Ord. IX, r. 4 (1), is accepted without undue irritation by plaintiffs' solicitors, who must often proceed to court for the appointed hearing without the slightest knowledge whether a defence will be met, and, if so, what it is or will be.*

But any plaintiff concerned in what the "Conveyancer's Diary" calls a "middle-sized" ordinary action has an adequate remedy ready to hand if no defence is delivered, namely, Ord. IX, r. 4 (5). The case will, in such circumstances, be of sufficient substance and interest to justify an application to the court to compel the defendant to file a defence, or in default be barred from defending. The question of time for so doing has to be closely watched, and it will possibly be necessary at the same time to secure a postponement of the appointed hearing, which in the ordinary way will by that time be fairly imminent. There should be no difficulty in mulcting the defendant in the costs of any reasonable application on these lines.

It seems also not impossible adequately to deal, under the rules as they stand, with the suggested difficulty about counter-claims, defences thereto, and replies. It is hardly to be expected that the *plaintiff* should normally be desirous of burdening himself with the obligation, or privilege, of filing a defence to counter-claim, or replying to a defence. If he really wants to air his views on the defence and/or counter-claim, in the hope that his adversary will thereby be induced to abandon his position, is there any reason why he, or his solicitors, should not write an open letter to the other side to be put in as part of the relevant correspondence? It must more often be the defendant who, having filed his defence and/or counter-claim, desires to know by what contentions he is to be met. In such a case, application can, and ought to, be made to the court under Ord. XIII, r. 3, para. (2) of which provides—

> ". . . the court may at any time on the application on notice of any party or of its own motion direct any party to file or deliver any pleading, particulars or answer which the court thinks necessary for defining the issues in the proceedings."

What is more significant in relation to proceedings of the kind obviously contemplated by the "Conveyancer's Diary," is that in the variety of "matters" which can come before the county court by originating application, petition, or appeal, there are no general provisions whatever for any pleadings after the initial process. Such cases may obviously raise important and difficult issues which need to be defined if the trial is to be reasonably satisfactorily conducted, but there is no direct machinery for formulating them, unless specific directions are obtained or given under Ord. XIII, r. 3. But this rule is capable of being utilised to satisfy any reasonable desire of any interested party in the matter of formal pleadings.

* The contributor was moved to protest at the suggestion of his learned Registrar that only item 7 in the lower scale (or 53 in the higher scales) is allowable to the plaintiff's solicitor in a case where the defendant files neither an admission nor a defence, but appears at the hearing and admits the claim. Clearly the slightly more remunerative item 8 (or 54 in the higher scales) is appropriate.

COMPANY LAW AND PRACTICE

FLOATING CHARGES CREATED WITHIN SIX MONTHS OF LIQUIDATION

ANOTHER war-time case which deserves closer consideration than I have hitherto had an opportunity of giving in this column is *Re Destone Fabrics, Ltd.* [1941] Ch. 319. The case involved the application of s. 266 of the Companies Act, 1929, and I think I had better remind my readers of the exact provisions of that interesting and important section by quoting it in full. It runs as follows: "Where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of the charge, together with interest on that amount at the rate of 5 per cent. per annum."

The general object and effect of the section are plain: it is designed to prevent an insolvent company, contemplating an imminent liquidation, from validly giving an existing creditor a security in the form of a floating charge. For one reason or another such a transaction may not constitute a fraudulent preference and so be invalid on that ground; s. 266 is in some respects wider in its application than the fraudulent preference provisions, for example, in regard to the time period (six months instead of three months), and to the fact that pressure by the creditor, resulting in the giving of the charge, does not save it from being invalid. Parker, J., in *Re Orleans Motor Co., Ltd.* [1911] 2 Ch. 41, succinctly described the object of the section as being "to prevent companies on their last legs from creating floating charges to secure past debts."

That case and the other more important decisions under the section have been concerned with the question, what is cash paid to the company within the meaning of the section? In the *Orleans Motor Co.* case the company had an overdraft

at the bank, and five of its directors had guaranteed the overdraft. The bank was pressing the company and the guarantor directors to pay off the overdraft, and at a directors' meeting it was agreed that the company should pay off the overdraft out of moneys to be provided by the guarantors, and that the latter should receive debentures to secure these moneys; this was done, the guarantor directors giving the company cheques for the amount and the company utilising these cheques to pay off the bank. Two months later the company went into liquidation, and in subsequent proceedings Parker, J., had to consider whether the floating charge created by the debentures was invalidated by the section; and more particularly, on the facts before him, whether cash was paid to the company in respect of them. He held that there had not in fact been any cash paid; the guarantors had gone through the form of handing their cheques to the company on the terms that the company should hand those cheques over to the bank and issue debentures for the amount of them. In substance the guarantors never parted with cash to the company and the company never received any cash—all that happened was that the guarantors, using the company as a conduit pipe, had paid the cash to the bank. Consequently the floating charge was invalid.

In *Re Destone Fabrics, Ltd., supra*, the facts may be summarised as follows: At a directors' meeting held at a time when the company was insolvent and the directors must have been well aware that it was insolvent, it was reported that D, who had guaranteed the company's overdraft up to £200, and who was accordingly a contingent creditor of the company for that amount, had offered to lend the company £900 on the security of a debenture. The offer was accepted, the debenture issued, and the money paid into the bank. On the same day that the money was paid, the company paid out of the bank £200 to D, and £700 to its two directors to whom this amount was owing in respect of directors' fees. Within a few weeks the company was in liquidation, and the court had now to consider the validity or otherwise under s. 266 of the floating charge created by the debenture. Simonds, J., pointed out that, in form cash had been paid to the company but the real question was whether, in substance, there had been a payment of cash, and he held that there had not. The debenture was nothing more than a contrivance whereby D and the directors might have a sum of money provided which would not in any way benefit the company, but which would largely benefit them, placing them in a better position than the other unsecured creditors of the company. The learned judge suggested that: "The ultimate test in such cases may well be whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company, or whether it is intended merely to provide certain moneys for the benefit of certain creditors of the company to the prejudice of other creditors of the company."

The two cases I have mentioned indicate that the courts are not satisfied, in applying the provisions of s. 266, by an apparent or formal payment of cash to the company, if as a matter of substance the company has not received cash; and the cases suggest the conclusion that it is fatal to the validity of the debenture that the money in respect of which it is issued is provided on a condition that it should be devoted to the payment off of certain debts. But this conclusion is not correct; the attachment of such a condition to a payment of money to the company, though it is a fact to which consideration has to be given, is not by itself fatal to the validity of the debenture containing a floating charge which would in other respects fall within the provisions of s. 266. This is illustrated by the decision of the Court of Appeal in *Re Matthew Ellis, Ltd.* [1933] Ch. 458. There a company which was in financial difficulty and insolvent obtained a loan from its chairman, who was also a partner in the firm which supplied the company with the bulk of its stock of goods. It was his view that an advance might save the company, but before making the advance he ascertained from his partners that they would only consent to continue to supply the company with goods on credit if a past debt to the firm of £2,000 was paid. Accordingly in March he advanced £3,000 to the company on the security of a debenture, after arranging with the company that out of this sum £2,000 should be applied in paying the past debt to the firm. In July the company was wound up. It was held that the debenture was valid as to the whole sum of £3,000; in substance and not merely in form there had been a payment of £3,000 in cash to the company, and it did not matter that the cash had been used by the company for the purpose of meeting a liability already incurred. The case, as the Court of Appeal emphasised, depended, as each case under the section must depend, on its particular facts. It was not right to divide the transaction into two—a payment in cash to the company of £1,000, and a payment to the advantage of the company, though not to it, of £2,000. The loan of £3,000 enabled the company to continue to carry on business, one important element requisite for that purpose being a continuation of the supply of goods on credit from the firm. It was indicated that the decision might well have been different if the firm had been in fact only the chairman himself, but the evidence showed that there were two other partners with a live interest in the partnership and negotiating on its behalf.

It is difficult to lay down a precise test by which to bring a particular case within the section, and it will be seen from the cases I have mentioned that the line of distinction may be a fine one. We have seen that Simonds, J. (as he then was) suggested that the ultimate test might be whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company; and in *Re Matthew Ellis*, Romer, L.J., made some illuminating observations on the applicability of the section: "Where . . . a man advances money to a company on the security of a debenture on the terms that the money so advanced is to be applied by the company in discharge of one of its existing liabilities or in the acquisition of some asset which the company does not at the moment possess, the money paid by the lender does not in my opinion cease to be cash paid to the company merely by reason of the imposition of that condition. There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture-holder to the company. If in such a case he goes through the form of drawing a cheque in favour of the company for the amount of his debt on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount, there has in fact been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance."

The position therefore, if it can be put shortly, would appear to be as follows: In deciding whether for the purposes of s. 266 there has been a payment of cash to the company all the facts of the particular case must be scrutinised. If this scrutiny reveals that there has been in form a payment of cash, you must go further and see whether there has been in substance a payment of cash to the company. There will not be such a payment if the facts show that the money was to be used for the benefit of certain creditors to the prejudice of others and was not intended *bona fide* for the benefit of the company. It can no longer be said as Astbury, J., said in *Re Hayman, Christy & Lilley, Ltd.* [1917] 1 Ch. 283, that, to satisfy the section, the cash must be absolutely and unconditionally paid to the company; but if a condition is applied to the use of the money advanced, that is a very relevant fact in deciding whether there was in substance an advance of cash to the company; it is not, however, decisive.

I should mention, as a matter of interest, that the Cohen Committee's report recommends an alteration of the period of six months mentioned in the section to twelve months.

A CONVEYANCER'S DIARY

TRUSTEES AND DIRECTORS' FEES

In *Re Macadam* [1946] Ch. 73; 89 Sol. J. 531, Cohen, J., considered whether the trustees of the will of the testator were entitled to retain directors' fees received by them from a certain company or whether they were accountable for those fees to the trust estate. The company was formed in pursuance of an order made by Astbury, J., on the 5th August, 1926, evidently as a result of earlier proceedings taken in the matter of the testator's will. By that will the testator, who died in 1922, directed that, in the events which happened, his trustees should be bound to accept, in substitution for the amount due to him at the date of his death under a certain partnership agreement, shares in a limited company to be formed, with as little delay after his death as possible, for the purpose of acquiring the partnership business. The articles of association of the company provided expressly that the trustee or trustees for the time being of the testator's will "may from time to time, until the trusts of his will shall be determined, so long as they shall hold shares in the company as such trustees, appoint two persons, who may or may not already hold shares in the company, to be directors of the company." The articles also provided that the remuneration of the directors should be such as "shall from time to time be determined by the company in general meeting." The plaintiffs were the trustees of the will and had become directors in pursuance of the power given to the trustees under the articles. Cohen, J., held that the plaintiffs were not entitled as a matter of right to retain their remuneration, but he left it open for future consideration whether he might not think it right for them to be allowed to retain some or all of it in the exercise of the court's discretion. He intimated that his decision on that point would turn on the question, which he had not considered, whether the plaintiffs were in fact the best persons to be directors.

The learned judge in his judgment referred first to the principle stated by Lord Herschell in *Bray* v. *Ford* [1896] A.C. 44, at p. 51, cited by Russell, J., in *Williams* v. *Barton* [1927] 2 Ch. 9, at p. 11: "it is an inflexible rule of a court of equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." He then turned to the application of this rule in a number of cases which are not at first sight altogether easy to reconcile. The first of them was the decision of Kekewich, J., in *Re Francis*, 92 L.T. 77. That was a case where the company had been formed for the purpose of taking over the business, assets and liabilities of a concern carried on by the testator. The company had been formed in his lifetime and he had been the first governing director. He had held all the shares in the company except seven, so that on his death his executors had absolute control of the company. They then proceeded, at a general meeting, to appoint themselves to be new directors. Kekewich, J., having stated the facts, pointed out that as directors they received a certain remuneration. He proceeded as follows: "They are accountable for that to the estate, there being no provision in the will which enables them to make a profit for themselves, and the court not having been asked to accede to the trustees being directors. Therefore they are accountable." He then went on to hold that they were accountable to capital rather than to income.

It had been admitted that if *Re Francis* was rightly decided it disposed of the present case. Counsel for the plaintiffs had argued, however, that it was inconsistent with the decision of the Court of Appeal in *Re Dover Coalfield Extension, Ltd.* [1908] 1 Ch. 65. In that case a Mr. Cousins, a director of the Dover Coalfield Extension, Ltd., at the request of that company became a director of another company, The Consolidated Kent Collieries Corporation, Ltd., in order that he might look after the interests of the Dover Company. After he had been appointed, and in order that he might acquire qualification shares within the time specified by the articles, there had been transferred into his name certain shares in the Kent Company which were the property of the Dover Company. He executed a declaration of trust in respect of those shares. It was held both by Warrington, J., and by the Court of Appeal that Mr. Cousins was entitled, as against the Dover Company, to retain fees received by him as a director of the Kent Company. The basis of that decision was that he had done the work and was entitled to the money. Cohen, J., however, distinguished it from *Re Francis* and from the present case on the ground that Mr. Cousins had been requested by the Dover Company to undertake the directorship and had not used his position as a trustee to acquire the directorship. Indeed, he was not a trustee of his qualification shares until after he became a director.

The other cases referred to in the judgment were *Re Lewis*, 103 L.T. 495, and *Williams* v. *Barton*, *supra*, both of which were entirely different from the present case and did not deal with the remuneration of directors.

I think it has been generally supposed up to now that *Re Francis* was wrongly decided, and that the effect of *Re Dover Coalfield Extension, Ltd.*, was, in general, to entitle a trustee who becomes a director of a company, the shares in which are vested in him as a trustee, to retain his remuneration. Thus, in the ninth edition of "Underhill on Trusts," at p. 353, the following passage appears: "A more difficult case is where a person holds an office of profit in a firm or company, shares in which are vested in him as a trustee. The better opinion seems to be that the trustee may in such cases legitimately keep the office of profit, and is not bound to account to the trust for the emoluments." Reference is then made to the decision of the Court of Appeal in *Re Dover Coalfield Extension, Ltd.*, and the learned author goes on to state that that case "seems to be irreconcilable with *Re Francis*" (which was not cited). Again, in the third edition of "Gover on Capital and Income," there is the following passage at p. 19: "Directors' fees, paid to trustees whose qualification as directors consisted of settled shares, were in one case held to be capital: *Re Francis* . . .; but it would seem to follow from the decision of the Court of Appeal in *Re Dover Coalfield Extension, Ltd.* . . . that such fees do not belong to the trust at all."

The principle of the decision in *Re Macadam* seems to be that trustees are not entitled to retain the remuneration attaching to directorships which they have acquired by exercise of powers vested in them as trustees. As the learned judge put it (at p. 82) "the root of the matter really is, did he acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?" It is on that ground that *Re Dover Coalfield Extension, Ltd.*, is distinguishable, since, in effect, the trustee in that case acquired his position as trustee by virtue of his directorship. It is, however, essential to note that none of these decisions affect those cases where the will or settlement contains a charging clause wide enough to cover the activities in question. Thus, in the passage cited above from the speech of Lord Herschell in *Bray* v. *Ford*, there appear the words "(a trustee) is not, unless otherwise expressly provided, entitled to make a profit." Again, in the passage cited from the judgment of Kekewich, J., in *Re Francis*, there occurs the expression "they are accountable . . . to the estate, there being no provision in the will which enables them to make a profit for themselves." There was apparently no charging clause in *Re Dover Coalfield Extension, Ltd.*, or, it is submitted, the case would have been entirely unarguable. Likewise there seems not to have been any charging clause either in *Re Lewis* or in *Williams* v. *Barton*. Again, so far as the report shows, there was no charging clause in *Re Macadam* itself. The fact that the position would be altered by the presence of such a clause does not appear very clearly from the text-books. They are concerned in the passages cited to deal with the only class of case where the problem can arise, namely,

those cases where there is no sufficient charging clause, and are not therefore concerned to comment on cases of the other sort. Further, practically all the cases in the books on the interpretation of charging clauses are concerned with the activities of solicitors, the only exceptions ready to hand being *Matthison* v. *Clarke*, 3 Drew. 3 (where the trustee was an auctioneer); *Re Wertheimer*, 106 L.T. 590 (where the trustee was an art expert at the British Museum), and *National Trustees of Australia* v. *General Finance of Australia* [1905] A.C. 380 (where the person concerned was a corporate trustee). So far as I can find, the question of trustees acting as directors has never been the subject-matter of a direct decision upon the interpretation of the charging clause. I do not think that the narrowest form would usually cover this case, namely, where the permitted charges are those for professional services only; but, having regard to the expressions cited above in the decisions in *Bray* v. *Ford* and *Re Francis*, I suggest that the directors' fees may be retained where the clause is in the wider form entitling the trustee to charge for "acts which a trustee not being in any profession or business could have done personally." In any case where there is no such clause it appears to me now to be imperative that the trustees should apply to the court for directions in the matter, and for leave, under s. 57 of the Trustee Act, or otherwise, to retain their fees. I cannot help feeling that the court, as a matter of discretion, is likely to look favourably upon an application of this sort, so long as it is reasonably clear that the trustee is the best practicable person to hold the directorship.

LANDLORD AND TENANT NOTEBOOK

INJUNCTION QUIA TIMET

LEGAL experts employed by the United Nations Organisation have been asked to examine the possibilities of improving a certain provision which uses the expressions "situation" and "dispute." Those of them who are familiar with English law will no doubt be reminded of the jurisdiction of Court of Equity to restrain threatened wrongs by injunction, for the idea, or part of it, is that the Security Council shall distinguish happenings which are not likely to lead to a breach of the peace from those which are. On this analogy, the task is bound to prove a difficult one, and the authorities will show that our courts have been loath to take what might be premature action. They have been resourceful, and have introduced new doctrines, such as that of equitable waste, when occasion demanded: this happened in the case of *Vane* v. *Barnard* (*Lord*) (1716), 2 Vern. 738, when, in the dramatic words of the report, "the defendant, Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, etc., to the value of £3,000," he being life tenant of that castle and unimpeachable for waste. By the time £3,000 worth of damage was done, it must have been clear that there was a "dispute"; but it will be noted that while the stripping was "of a sudden," this is not said about the displeasure, nor could two hundred workmen be quickly assembled even in 1716. From which it is apparent that there must have been a "situation," and one wonders whether the remainderman would have been successful if he had sought relief at an earlier stage.

Between landlord and tenant, the power to grant an injunction against threatened waste was well illustrated by the Irish decision of *Hunt* v. *Browne* (1837), Sau. & Sc. 174. The tenant held a perpetually renewable lease, but one which he could surrender if he chose, the right being available once in every three years, of a house and pasture land near Dublin: there was a penal rent provision which would come into operation if he ploughed the land up for tillage, while another provision expressly authorised him to break up land for small gardens if he erected houses; and a covenant to keep buildings and fences in repair was also mentioned. Being the director of a cemetery company, he proposed to convert the pasture into a burial ground; he admitted this, but alleged that it would in fact beautify and enhance the value of the property (the respectable tenant of the house, according to the defendant, had no objection at all to the proposed change in his surroundings). An injunction was sought on various grounds, nuisance being alleged as well as breaches of covenants; but the ground on which the defendant was restrained is clearly that of breach of duty not to change the nature of the thing demised, i.e., of waste: the lessor would be unable to use the land for any other purpose than that of a cemetery on the lease terminating.

The case does not, however, exemplify the difficulties more often confronting those who consider that their rights are about to be infringed: those of fitting the available facts to an available covenant, and of proving that their rights are indeed threatened. In *Worsley* v. *Swann* (1882), 51 L.J. Ch. 576 (C.A.), the defendant, bound by a covenant that any building or erection on his land should not be used otherwise than as a private dwelling-house, asked to be released from this restriction; his request was refused; he proceeded to begin the erection of a circus; whereupon the plaintiffs, entitled to the benefit of the covenant, obtained an order restraining him from erecting or causing to be erected a circus or model lodging-house (how this came into the affair is not clear) or either of them, or from erecting any building contrary to his covenants. This was discharged on appeal, on the simple ground that the covenant restricted use only. One of those cases to which we would so like to know the sequel; clearly, the defendant might proceed to build his circus and could safely leave it empty; but whether he would be in default if he inhabited it as a residence or let it as such would have been an interesting question.

In *Phipps* v. *Jackson* (1887), 56 L.J. Ch. 550, a covenantee landlord found himself up against the rule that specific performance of certain covenants will not be ordered, directly or indirectly. The defendant was a yearly tenant of a farm on which he had covenanted at all times to keep a proper and sufficient stock of sheep, horses and cattle. After telling the plaintiff's agent that he wished to give up, and after the agent had accepted an apparently short notice to quit, he advertised the sale of the whole of his stock in local newspapers and by posters displayed in the neighbourhood. Stirling, J., said he could not grant an injunction to restrain the defendant, because, in effect, he would be ordering specific performance of a covenant which was not an express negative covenant, so the court could not supervise performance. I suggest that there was another objection, when the result of *Worsley* v. *Swann* is considered: the defendant could sell and replace.

And this difficulty becomes more apparent if one goes back to *Pattison* v. *Gilford* (1874), 18 Eq. Cas. 259. Two separate passages from the judgment of Jessel, M.R., in that case, taken together, express the position concisely: (1) "A plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an *inevitable result*"; (2) "When I say inevitably, I do not use the word in the sense of there being no possibility the other way, because I think courts of justice must always act upon the theory of *very great probability being sufficient* . . ." The problem, one might say, of the man in the non-smoking compartment who produces pipe and pouch and fills the former. In the case before the court, a shooting tenant who held a grant for twenty-one years from 1870 became apprehensive when his landlord sold the property to a purchaser, who first advertised it as building land, and then, having heard from the tenant, issued particulars of its sale in thirteen lots, describing it, *inter alia*, as "building land delightfully situate and suitable for the erection of villas and residences," but specifically mentioning the plaintiff's tenancy. However, a plan attached showed an intention to make a road, and evidence was given that the road had been staked out, two hedges being cut through; but also that the coverts and

plantations were intact. In these circumstances, the learned Master of the Rolls, while remarking at the commencement of his judgment that he had a strong notion that the defendant would have done something wrong if the plaintiff had not written him a letter, said he must consider the answer, which was, in effect, " Look at my particulars of sale," and he (the Master of the Rolls) must look at them. Having done so, he came to the conclusion that the defendant had carefully abstained from representing that any part of the land was immediately available for building purposes.

TO-DAY AND YESTERDAY

March 11.—William Rann Kennedy, the eldest son of a clergyman, was born at 9 Campden Hill Villas, Kensington, on 11th March, 1846. His father and uncles were distinguished classical scholars and he carried on the tradition at Eton and King's College, Cambridge. After taking his degree he taught the sixth form at Harrow for a year. From 1869 to 1874 he was a fellow of Pembroke College. He was called to the bar by Lincoln's Inn in 1871, joining the Northern Circuit, and in 1885 he took silk. He was appointed a judge of the Queen's Bench Division in 1892, and he frequently sat in the Commercial Court. In 1907 he went to the Court of Appeal. He died in 1915. His great learning, acute intellect and lucid expression were quite unmarred by either vanity or pedantry, for he was the most self-effacing of men.

March 12.—On 12th March, 1733, the House of Lords heard the case of *Patterson* v. *Graham*, an appeal from the Court of Session. It arose out of the " South Sea Bubble " and attracted many listeners to the bar of the House. The appellant was a London broker, whom the respondent, living in Edinburgh, had employed to buy South Sea stock, then at an extravagant height. Instead of rising further, it fell to nothing immediately after the purchase, and the respondent successfully sued the appellant, relying on fraud, requiring the return of the purchase money with interest. The respondent succeeded in the Court of Session but the Lords reversed the decision.

March 13.—A record in the Close Rolls, dated 13th March, 1375, tells of a complaint before the King's Council by clerks of the Chancery and apprentices of the King's Court, who were used to have their common sport in Fickett's Field (now New Square, Lincoln's Inn). They alleged that one Legat had hidden iron engines called " caltrappes " on a dyke newly raised by him there, intending to maim those who came upon it. Legat confessed his fault before the Council in the Blackfriars' Chapterhouse, was committed to the Fleet Prison and only released on payment of a fine.

March 14.—" The Black Books of Lincoln's Inn " record that on 14th March, 1442, Richard Wode, one of the governors of the Society, received 49s. 5d., from the treasury " *pro potacione inter Hospitium de Lyncoln ynne et Hospicium Medii Templi.*"

March 15.—On 15th March, 1797, Sir Walter Scott noted in his diary : " Read Stanfield's trial, and the conviction appears very doubtful indeed. Surely no one could seriously believe, in 1688, that the body of the murdered bleeds at the touch of the murderer, and I see little else that directly touches Philip Stanfield. He was a very bad character, however . . . It was believed at the time that Lady Stanfield had a hand in the assassination, or was at least privy to her son's plans ; but I see nothing inconsistent with the old gentleman's having committed suicide. The ordeal of touching the corpse was observed in Germany. They call it barrecht."

March 16.—John Nicholl, second son of John Nicholl, of Llanmaes, Glamorganshire, was born on 16th March, 1759. He was admitted an advocate at Doctors' Commons in 1785. He gained an extensive practice and also sat in Parliament. He became Dean of the Arches and judge of the prerogative court of Canterbury in 1809, and judge of the High Court of Admiralty in 1833. During the Napoleonic invasion scare he actively promoted a volunteer corps among the advocates and proctors, and became Lieutenant-Colonel of the St. George's, Bloomsbury, Volunteers.

March 17.—Stanhope's Buildings stood along what is now the north side of Gray's Inn Square. On 17th March, 1610, the occupants of three chambers one under the other at the west end asked for a piece of ground four yards by twelve to erect a supporting building without which their building " being weakly built and much decayed must of necessity fall."

STATE LOTTERIES

In a recent article in a daily paper a journalist envisaging himself as " Minister of Pleasure," started with a scheme to legalise some sweepstakes which would provide the people with a considerable amount of innocent pleasure, and the Ministry with money. It is a scheme which for quite a long time commended itself to our rulers. It was Elizabeth who first tried the experiment here on a grand scale, and in 1567 there was advertised " a very rich general lottery without any blanks containing a great number of good prizes, as well of ready money as of plate and certain sorts of merchandises, having been valued and priced by the commandment of the Queen's most excellent majesty by men expert and skilful ; and the same lottery is erected by her Majesty's order to the intent that such commodity as may chance to arise thereof, after the charges borne, may be converted towards the reparation of the havens and strength of the realm and towards such other public good works." There were to be 400,000 10s. tickets and a large number of prizes to the total value of some £60,000. " The greatest and most excellent prize ' was to the value of £5,000, i.e., £3,000 in cash, £700 in plate,' and the rest in good tapissarie meete for hangings, and other covertures, and certain sortes of good linen." Investors might come to this City of London, York, Norwich, Exeter and other named towns and remain seven days " without any molestation or arrest of them for any manner of offence, saving treason, murder, piracy or any other felony." This immunity does not seem to have been strictly observed, for in 1569 a prisoner for debt writes to Sir William Cecil complaining that he " thought he should have been protected under the proclamation for the lottery, but it was made a jest of."

NO ENTHUSIASM

Curiously enough, the gambling instincts of the English did not respond to this alluring prospectus, and four more royal proclamations and one by the Lord Mayor of London failed to arouse their enthusiasm. Tickets remained little in demand and the draw had to be put off from the original date of 25th June, 1568, first to 3rd November, and then to 10th January, 1569. An intensive campaign of publicity was designed to put pressure onto the City livery companies, the boroughs, towns and villages of England and the inhabitants of Ireland too. Twenty surveyors went forth to explain the scheme and " animate the people." It had been expected that after prizes and expenses were paid £100,000 would be available for public purposes, but when at last the draw could no longer be postponed, the return was so exiguous that the benefits had to be reduced to one-twelfth of those promised. Though less than 34,000 tickets had been sold the draw in St. Paul's Churchyard took sixteen weeks and lasted until May. Posies or mottos written on the counterfoils were a feature of the occasion.

For the Grocers :

" For the Grocers' Hall
A lot great or small."

For the Haberdashers :

" Our sum put in
Is in hope to win."

For a Sussex man :

" Draw Brighthemston a good lot
Or else return them a turbot."

Robert Shute, Reader of Gray's Inn, won 1s. 2d. with the motto : " *Et mihi et multis.*" Thomas Colby of Gray's Inn did better with 7s. 6d. under the device, " *Nupida nobis impados tyrogansoma turgyso totnos.*"

The usual monthly meeting of the directors of The Law Association was held on the 4th March, Mr. Frank S. Pritchard in the chair. The other directors present were Messrs. C. A. Dawson, T. L. Dinwiddy, Douglas T. Garrett, Ernest Goddard, G. D. Hugh Jones and William Winterbotham, and the secretary, Mr. Andrew H. Morton. The sum of £169 was voted in relief of deserving applicants, and other general business was transacted.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL.*]*

Land Registry Delays

Sir,—We have just read the reference in "A Conveyancer's Diary" to the appalling delays in the Land Registry from which we too have been sufferers. In response gladly to your suggestion for examples of the delay in furnishing Certificates of Search, we send you a list of applications with dates of issue of certificates taken at random over the last two months. It should be borne in mind that the certificates did not reach us until one day after the date of issue and frequently not until two days.

Warrington. ROBERT DAVIES & CO.

PARTICULARS OF SEARCHES IN H.M. LAND REGISTRY

Date of Application	*No of Names*	*Date of Issue of Certificate*
1945.		1946
20th December	1	11th January
21st December	1	9th January
21st December	1	9th January
22nd December	1	7th January
27th December	2	10th January
29th December	2	11th January
29th December	2	14th January
1946.		
2nd January	1	18th January
2nd January	1	18th January
7th January	1	21st January
15th January	3	30th January
15th January	3	30th January
15th January	3	30th January
15th January	3	30th January
29th January	3	13th February
29th January	3	13th February
8th February	1	21st February
11th February	1	22nd February
11th February	1	22nd February
11th February	1	22nd February
11th February	1	22nd February
19th February	1	4th March
20th February	4	4th March

Sir,—With reference to your comments on the delay in issuing Certificates of Search from the Land Registry in THE SOLICITORS' JOURNAL for the 2nd of March (*ante, p.* 98), we append two recent incidents, both searches in one name only.

(*a*) Search despatched 4th February, 1946, certificate received 19th February, 1946.

(*b*) Search despatched 15th February, 1946, certificate received 1st March, 1946.

We are very happy to support your protest against this unreasonable delay as one cannot see any possible reason for it, particularly when one considers that in the height of the bombing attacks on this country, it was unusual to wait more than seven or eight days for a certificate.

In the first-mentioned case given above, completion was in London, and after waiting ten days we had to instruct London agents to make a personal search in the Land Registry so that completion could take place, which is, of course, added expense both to our client and, in addition, considerable inconvenience was caused to our London agents in having to make this search.

Altrincham. W. H. LILL & CO.

Sir,—With reference to your article in the issue of the 2nd inst., in which you invite readers to give items of the delays which are occurring. We do not propose to do this as we could almost fill a column for you, suffice to say that we had so many completions held up owing to the failure of the Land Registry to issue the search certificates in time that the position became absolutely impossible. We had therefore to disregard entirely the applications we had already sent in and instruct agents to make personal searches at the Registry.

In this unsatisfactory way we were able to get the completions through, and the search certificates are now beginning to come in from the Registry dated from a week to a fortnight after completion has taken place.

With regard to registered titles, documents which we sent to the Registry last autumn are now being dealt with.

Ilford. FRANK WHITE & WILLIAMS.

The Conveyancer writes: "I am much obliged for these letters, which confirm my previous information as to the present deplorable state of affairs. I am also indebted to another correspondent who has sent me a specimen, dated early in February, of the circular used by the Land Registry to reply to inquiries as to the progress of pending applications for the registration of title. It confirms: (i) That 'at present the time taken to complete registrations which are in order is *at least* twenty weeks from the date of receipt' (Land Registry's italics); (ii) that applications can only be expedited if the land has been '(re)sold or (re-)mortgaged,' in which case an expedition fee of one guinea is payable; (iii) that voluntary applications for first registration of land cannot be expedited. I trust that the facts elicited will be quoted in Parliament (and at earlier stages) if any suggestion is hereafter made for the extension of compulsory registration of title, under Pt. XI of the Land Registration Act, 1925. Other comments occur to me, and will certainly occur to readers, but I refrain from making them.

Pleadings in the County Court

Sir,—The very interesting article in your issue of the 9th February last (*ante*, p. 62) dealt with the difficulties that arise in an ordinary action when no defence is delivered or where the defence is insufficient. May I, as an ex-registrar, offer what I feel may be a few practical suggestions? The court can under Ord. 13, r. 3, on the application of any party, *or on its own motion*, give such directions as it thinks proper, or direct any party to file or deliver any pleading particulars or answer which the court thinks necessary for defining the issues in the proceedings. I have often given such directions so that the court shall know what it has to deal with on the trial, and a very useful step is for a party to apply for delivery of what is required and that if the order is not complied with, within a stated time, that the claim shall be struck out, with costs, or that the defendant be debarred, under Ord. 9, r. 4 (8), from defending altogether, and that the costs relating to the application shall be the applicants in any event. It is true that under Ord. 9, r. 4 (4) a defendant can deliver a defence at any time before the return day, but if an order has been made debarring him he would, I suggest, have to apply to have the order debarring him revoked or varied. That rule also empowers a defendant who has not delivered a defence to appear on the return day and dispute the plaintiff's claim, but the court can order him to pay any costs properly incurred in consequence of his delay or failure. A defendant in default is at the mercy of the court, and before he is allowed to defend the court can impose terms under Ord. 13, r. 2, requiring (*a*) security, (*c*) payment of money into court, and (*d*) payment of costs. I have found that a most effective order in such circumstances is to give leave, subject to the defendant paying into court, within a stated time, the debt and costs indorsed on the summons, to abide a further order of the court, and that the costs occasioned by the delay or default shall be the plaintiff's in any event.

The writer of the article contends that there is no provision allowing or requiring a defence to a counter-claim, but my submission is that there is power under Ord. 13, r. 3 (2) to require such a defence. The order says that "the court may direct any party to deliver any pleading . . . which the court thinks necessary for defining the issues in the proceedings." A counter-claim is really a separate cause of action and on the trial requires a judgment, and the costs have to be dealt with under Ord. 47, r. 7 (1), which says that r. 6 shall apply to a counter-claim as it applies to the claim. I have frequently made orders for the delivery of a defence to a counter-claim, and I cannot remember such an order being challenged or overruled.

WILFRED DELL
(retired Registrar of the Mayor's and City of London Court).

Hailsham, Sussex.

Notice is given that the Treasury have fixed at 2¾ per cent., as from the 8th March, 1946, and until further notice, the rate of interest to be adopted in discounting future payments in respect of instalments of an annuity charged by the Tithe Act, 1936, for the purpose of determining, in accordance with the Redemption Annuities (Extinguishment and Reduction) Rules, 1937, the amount of consideration money to be paid for the redemption of the annuity. On the basis of this rate of interest, the amount required to redeem an annuity is approximately 26½ times the amount of the annuity (or 53 times the amount of the half-yearly instalment).

NOTES OF CASES

CHANCERY DIVISION

Brading *v.* **F. McNeill & Co., Ltd.**

Evershed, J. 14th December, 1945

Contract—Sale of leasehold premises and goods—Vendors repudiate contract—Measure of damages.

Witness action.

The defendant company by a letter dated 3rd January, 1945, offered to sell the plaintiff (1) the entire plant and buildings of the pipe works at S for the sum of £1,000; (2) the stock of pipes at S at cost. These items were to be paid for in cash. They also agreed to transfer to him the lease of the works without additional consideration. The plaintiff wrote accepting that offer and a binding contract resulted. On the 18th January, 1945, the defendants repudiated the contract. It was agreed that the sum to be paid under the contract was £3,289 11s. 3d. The actual value of the property, the subject of the agreement, was £6,153, giving the plaintiff a benefit of £2,863 8s. 9d. The defendants originally agreed to sell at the reduced figure as the plaintiff had been employed by them and they wished to make some provision for him. The plaintiff had not been in a position to pay the £3,289 11s. 3d. himself, and between the date of the defendants' offer and his acceptance, he had entered into an agreement with L, Ltd., under which he was to transfer the benefit of defendants' offer at the same price to L, Ltd., that company agreeing to employ the plaintiff as manager of the works at £750 a year. In this action the plaintiff claimed damages for the breach by the defendants of their agreement, his original claim for specific performance being dropped. On these facts the defendants contended that the plaintiff was merely an intermediary and that, when the sale went off, he suffered no damage, or, alternatively, the damage he suffered was the loss of his employment with L, Ltd.

EVERSHED, J., said that the answer to the question as to what was the measure of damages for a breach of contract was formulated in *Robinson* v. *Harman* (1848), 1 Ex. 850, by Parke, B., as follows: "the rule of the common law is that where a party sustained a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." In applying that rule, the question arose as to the notice the court must take of any alteration by the plaintiff of his own position in relation to the subject-matter of his contract made by him either contemporaneously with or subsequent to the main contract. On behalf of the plaintiff reference had been made to decisions in regard to sub-sales of goods and of shares, which showed that the rule was that the court should not look at matters beyond or incidental to the plaintiff, including, in particular, sub-contracts made by a plaintiff at a sum either less than the true value or at a sum greater than the true value (*Rodocanachi* v. *Milburn*, 18 Q.B. 67; *Williams Bros.* v. *Ed. T. Agius, Ltd.* [1914] A.C. 510). He would apply the principle laid down in those cases. Accordingly, the plaintiff was entitled to judgment for the sum of £2,863 8s. 9d.

COUNSEL: *Valentine Holmes*, K.C., and *Patrick O'Connor*; *Charles Harman*, K.C., and *A. C. Nesbitt*.

SOLICITORS: *Wild, Collins & Crosse*; *Merrimans*.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.

KING'S BENCH DIVISION

Twine *v.* **Bean's Express, Ltd.**

Uthwatt, J. (sitting as an additional judge of the King's Bench Division). 11th December, 1945

Negligence—Fatal accident to passenger riding in defendants' vehicle—Driver forbidden to give lifts—Notice on vehicle prohibiting unauthorised persons travelling in it—Whether defendants liable for negligence of driver.

Witness action.

The defendants, by an arrangement with the Post Office Savings Bank, provided a commercial vehicle for the use of the bank and a driver, one H, on the terms that the driver remained the servant of the defendants. It was part of the agreement that the defendants accepted no responsibility for persons riding in the van who were not employed by the defendants. A notice was on the dashboard of the van stating that "no unauthorised person is allowed on this vehicle: By Order." There was a further notice by the driver's seat stating that drivers were not to allow unauthorised travellers on the van. On the 6th April, 1944, T, a porter employed by the bank, had, in the course of his duties, to go from the head office of the bank to a branch office and, with the consent of H, he went in the van. T had travelled in the van on previous occasions and H had told him, in effect, that he travelled at his own risk. Owing to the negligent driving of H, an accident occurred and T was killed. In this action T's widow and personal representative claimed damages against the defendants under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and her infant children, and under the Law Reform (Miscellaneous Provisions) Act, 1934.

UTHWATT, J., said it was argued for the plaintiff that H owed a duty to T to take care; that the accident happened while the driver was engaged on a duly authorised job in the course of his employment; that the acts of the driver were done in the course of his employment notwithstanding the unauthorised presence in the van of T, and the defendants were accordingly liable. The defendants were prepared to fight the case on the lines that the question was not whether the driver owed a duty to take care, but whether the defendants owed that duty. The law attributed to the employer the acts of a servant done in the course of his employment and fastened on him responsibility for those acts. The general question in an action against the employer was "did the employer in the circumstances which affected him owe a duty?" for the law did not attribute to the employer the liability which attached to the servant. On the facts, it was outside the scope of the driver's employment for him to bring within the class of persons to whom a duty to take care was owed by the defendants a man to whom, contrary to his instructions, he gave a lift; T, *vis-a-vis* the defendants, was a trespasser in the van. The question was whether in these circumstances the defendants owed T any duty to take care. In his opinion they did not. The defendants did not owe a duty to the world at large to take care, but they did owe that duty to all persons who might reasonably be anticipated by them as likely to be injured by negligent drivers of the van and no others. Action dismissed.

COUNSEL: *Sir Charles Doughty*, K.C., and *R. T. Monier-Williams*; *Serjeant Sullivan*, K.C., and *Valentine Holmes*, K.C.

SOLICITORS: *Simpson, Palmer & Winder*; *A. E. Wyeth & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

Monmouth County Council *v.* **Newport Corporation**

Atkinson, J. 19th December, 1945

Local government—Extension of county borough—Financial adjustment between borough and county—General Exchequer Grant—Arbitrator's power to give interest on sum awarded—Newport Extension Act, 1934 (24 & 25 *Geo.* 5, *c.* lvii), *ss.* 4, 58—*Local Government Act*, 1929 (19 & 20 *Geo.* 5, *c.* 17)—*Local Government Act*, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 152 (1) (*b*), *Sched. V*, *r.* 1.

Special case stated by an arbitrator under s. 151 (3) of the Local Government Act, 1933.

By s. 4 of the Newport Extension Act, 1934, the boundary of Newport County Borough was altered to include certain additional areas, and by s. 58,(1) of that Act financial adjustments consequential on the Act are to be made between the local authorities affected, in accordance with ss. 151 and 152 of the Local Government Act, 1933, as if the Act of 1934 were an order made under Pt. VI of the Act of 1933. By s. 152 (1) (*b*) of the Act of 1933, "Provision shall . . . be made for the payment to a local authority" of an equitable sum "in respect of any increase of burden which, as a consequence of any alteration of boundaries . . . will properly be thrown on the ratepayers . . . in meeting the cost incurred by that local authority in the discharge of any of their functions. By r. 1 of the rules for determining the above equitable sum, contained in Sched. V to the Act of 1933, "Regard shall be had" to the increased burden incurred as stated in s. 152 (1) (*b*) " . . . Provided that no alteration of income in consequence of an apportionment under . . . s. 108 (1) (*b*) of the Local Government Act, 1929, shall be taken into account." Section 86 of the Act of 1929 provides for the payment by Parliament every year of an annual contribution towards local government expenses in counties and county boroughs called the "General Exchequer Contribution," and by s. 88 that contribution is to be apportioned in the manner prescribed among the several counties and county boroughs. By s. 89, out of the sum apportioned to a county under s. 88, a sum is to be set aside for the payment of prescribed amounts to district councils, the residue being retained by the county council and called its General Exchequer Grant. By s. 108 (1) (*b*), the Minister of Health is empowered to regulate "the manner in which the amounts of any grants payable under the Act are to be adjusted . . . in consequence of any alterations of boundaries . . ." By s. 105 the general Exchequer grant is applicable by the county council to "general county purposes," which are defined in s. 180 (1) (*a*) as meaning "purposes for expenditure on which the whole county is chargeable . . ."

A financial adjustment having become necessary between Newport Borough Council and Monmouthshire County Council in consequence of the extension of the county borough, with consequent reduction in the area of the county, the county council presented a claim to the corporation. The matters on which the parties could not agree were referred to an arbitrator, who left questions for the opinion of the court. (*Cur. adv. vult.*)

ATKINSON, J., after reciting all the relevant statutory provisions and considering the financial details of the adjustment and the parties' contentions, said that, on the true construction of the proviso to r. 1 of the rules set out in Sched. V to the Local Government Act, 1933, the income referred to therein was that which had been received by those whose burden was under consideration, namely, the ratepayers of the reduced county, and that accordingly the adjustment must be made on the basis that those ratepayers were now entitled to receive the same amount out of the grant, after the transfer of the areas concerned to the county borough, as they had received before, and not the full amount of the grant received by the county before that transfer. As to the question of interest, he applied *Richard* v. *Great Western Railway Company* [1905] 1 K.B. 68, and *Swift & Co.* v. *Board of Trade* [1925] A.C. 520, and distinguished *Fletcher* v. *Lancashire & Yorkshire Railway* [1902] 1 Ch. 901, and said that, both on equitable principles and on the true construction of s. 152 (1) (*b*) of the Local Government Act, 1933, no interest was, in his opinion, awardable to the county council on the sum payable to them on the adjustment in respect of the period from the date of the transfer of the areas concerned to the county borough to the date on which the amount of the sum so payable was ascertained.

COUNSEL: *Turner*, K.C., *Erskine Simes*, K.C., and *Harold Williams* (County Council); *Comyns Carr*, K.C., *Fitzgerald*, K.C., and *Neep*.

SOLICITORS: *Torr & Co.*, for *Vernon Lawrence*, Newport; *Rees & Freres*, for the *Town Clerk*, Newport, Mon.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

OBITUARY

MR. H. R. DARLINGTON

Mr. Hayward Radcliffe Darlington, barrister-at-law, died on Wednesday, 6th March, aged eighty-three. He was called by Lincoln's Inn in 1887.

MR. C. E. SWINBURNE

Mr. Charles Edward Swinburne, solicitor, of Messrs. H. & A. Swinburne, solicitors, of Gateshead, died on Wednesday, 27th February, aged seventy-six. He was admitted in 1917.

PARLIAMENTARY NEWS

ROYAL ASSENT

The following Bills received the Royal Assent on the 6th March:—

ASSURANCE COMPANIES.
AGRICULTURAL DEVELOPMENT (PLOUGHING-UP OF LAND).
AGRICULTURE (ARTIFICIAL INSEMINATION).
MINISTERS OF THE CROWN (TRANSFER OF FUNCTIONS).
TRUNK ROADS.

HOUSE OF LORDS

Read Second Time:—

MINISTRY OF HEALTH PROVISIONAL ORDER (MORTLAKE CREMATORIUM) BILL [H.C.]. [6th March.

Read Third Time:—

NEWCASTLE-UPON-TYNE CORPORATION BILL [H.L.]. [6th March.

HOUSE OF COMMONS

Read First Time:—

UNITED NATIONS BILL [H.L.]. [5th March.

Read Second Time:—

HOUSING (FINANCIAL AND MISCELLANEOUS PROVISIONS) BILL [H.C.]. [6th March.

MISCELLANEOUS FINANCIAL PROVISIONS BILL [H.C.]. [1st March.

PUBLIC WORKS LOANS BILL [H.C.]. [1st March.

QUESTIONS TO MINISTERS

PROBATE APPLICATIONS: SMALL ESTATES

Sir H. WEBBE asked the Attorney-General whether, in cases where an applicant for probate is invalid or infirm, arrangements can be made for the estate duty accounts and other necessary papers to be lodged by a friend of the applicant and so avoid the expense of instructing a solicitor in cases where the estate involved is very small.

The ATTORNEY-GENERAL: I am obliged to the hon. member for bringing the matter to notice. The possibility of arranging special facilities where the applicant for probate or letters of administration to an estate of small value is an invalid or is infirm, is being examined by the President of the Probate Division. [4th March.

DECREE *NISI* PROCEDURE

Sir ALAN HERBERT asked the Attorney-General whether he will consider introducing legislation abolishing the decree *nisi* procedure in matrimonial causes, but giving the King's Proctor a right of appeal.

The ATTORNEY-GENERAL: The question of abolishing or modifying the decree *nisi* procedure in matrimonial causes is at present under consideration, and the suggestion made by my hon. friend will be borne in mind.

Sir ALAN HERBERT asked the Attorney-General in how many matrimonial causes since 1st January, 1938, the King's Proctor has intervened to show cause why a decree *nisi* should not be made absolute.

The ATTORNEY-GENERAL: From 1st January, 1938, to 28th February, 1946, the King's Proctor has intervened in 161 cases. This figure includes 16 which are still pending. [4th March.

ESTATE DUTY OFFICE

Mr. CARSON asked the Chancellor of the Exchequer whether he is now in a position to give an approximate date when the Estate Duty Office branch of the Civil Service now at Llandudno will return to London.

Mr. DALTON: No, sir, I am afraid not. There is great pressure on space in London, and a great deal of work, including that of the Estate Duty Office, can be performed perfectly well in the country. There is no need for these people to come to London so far as the nature of their work is concerned. On the long view we must try to disperse a lot of our Civil Service activities away from the metropolis in the provinces.

Mr. GODFREY NICHOLSON: Is the Chancellor quite sure that a lot of unnecessary work is not caused to solicitors and agents by this office being in the country? If he reconsiders the matter I think he will find he is wrong. [5th March.

CONTROLLER OF STAMPS

Brigadier MEDLICOTT asked the Financial Secretary to the Treasury if he is aware of the delays which are taking place in the adjudication and stamping of documents; and if he can arrange for an early increase in the staff of the Controller of Stamps branch of the Inland Revenue.

Mr. GLENVIL HALL: Yes, sir. Every effort is being made to remedy the existing staff shortage. [5th March.

MAINTENANCE ORDERS

Major LEGGE-BOURKE asked the Secretary of State for the Home Department if he intends introducing legislation to raise the maximum allowance payable to a wife and child under a separation order, in view of the increase in wages and the cost of living.

Mr. EDE: I cannot hold out hope of legislation on this subject at the present time. [7th March.

LAW STUDENTS

Mr. CHAMPION asked the Minister of Labour if he will include law students in Class B for out-of-turn releases from the Forces.

Mr. ISAACS: Law students in the Forces are eligible for release in Class B if they are applied for by their universities and are holders of scholarships gained in open competitions and are in release groups 1–49. The question of further releases in Class B is under consideration, but I am unable to say yet what further categories can be included in such releases. [7th March.

LAND REGISTRY DELAYS

Brigadier MEDLICOTT asked the Attorney-General if he is aware that the work of the Land Registry and the Land Charges Department is still in arrear; and if he will give any indication as to when these Departments will be in a position to deal with their work at a normal pace.

The ATTORNEY-GENERAL (Sir Hartley Shawcross): I would refer the hon. member to the answer I gave to the hon. member for Hemel Hempstead (Viscountess Davidson) on 22nd January [*ante*, p. 58], when I explained that there were admittedly some delays due to shortage of staff. What I said then applies to the Land Charges Department as well as to the Land Registry, except that the delay in the former is less serious and may be expected to disappear within a few months.

Brigadier MEDLICOTT asked the Attorney-General how many men and women are employed in the Land Registry and the Land Charges Department at the present time; and how many were so employed in March, 1939.

The ATTORNEY-GENERAL: The number of men and women at present employed in the Land Registry and the Land Charges Department is 404; the corresponding number in March, 1939, was, 1,055.

Brigadier MEDLICOTT: Can the hon. and learned gentleman hold out any hope of an early increase in the experienced members of this staff, because these registries do play an essential part in the transfer of property which has a small, but definite, bearing on the housing problem? Delays at the present moment are very considerable.

The ATTORNEY-GENERAL: I appreciate the importance of the matter, and we are doing our utmost to improve it as quickly as may be. [6th March.

RULES AND ORDERS

S.R. & O. 1946, No. 320/L.4.

SUPREME COURT, ENGLAND.

PROCEDURE.

THE PRINCIPAL PROBATE REGISTRY (NON-CONTENTIOUS BUSINESS) ORDER, 1946. DATED MARCH 5, 1946.

I, William Allen Baron Jowitt, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by the Administration of Justice (Emergency Provisions) Act, 1939, and all other powers enabling me in that behalf and with the concurrence of two other Judges of the Supreme Court, do hereby order as follows:—

1. *Closing of Probate Registry at Llandudno.*]—On and after the 30th day of March, 1946, the Probate Registry at Llandudno shall be closed and the non-contentious probate business of that Registry shall be transacted in the Principal Probate Registry in London:

Provided that the Principal Probate Registry in London shall not be open for the transaction of the said business until the 10th day of April, 1946.

2. *Restoration of facilities for personal applications, deposit of wills, etc., in London.*]—On and after the 10th day of April, 1946—

(*a*) there shall be transacted in the Department of the Principal Probate Registry in London dealing with the application for grant of probate and letters of administration without the intervention of a solicitor all classes of business which were transacted therein immediately before the 17th day of September, 1940, and

(*b*) the local offices of the Principal Probate Registry established for the deposit and preservation of certain Wills and other documents shall be closed, and Wills and other documents so deposited may be inspected in, and copies thereof may be obtained from, the Principal Probate Registry in London in the same manner as was possible immediately before the 15th day of September, 1942.

3. *Sub-Registry at Canterbury.*]—The District Probate Sub-Registry at Canterbury shall remain closed until further Order.

4. *Revocation of Orders.*]—For the purpose of giving effect to the foregoing provisions of this Order—

(1) on the 30th day of March, 1946, the following paragraphs of the Principal Probate Registry (Non-Contentious Business) Order, 1940*, as amended by the Principal Probate Registry (Non-Contentious Business) (No. 2) Order, 1940,† shall be revoked, namely paragraphs 2, 5, 6, 7, 8 and 9; and

(2) on the 10th day of April, 1946, the following Orders shall be revoked, namely, the Principal Probate Registry (Non-Contentious Business) Order, 1940,* as amended by the Principal Probate Registry (Non-Contentious Business) Order, 1942,‡ and the Principal Probate Registry (Non-Contentious Business) (No. 2) Order, 1942,§ and also the Principal Probate Registry (Personal Applications) Order, 1943.‖

5. *Citation.*]—This Order may be cited as the Principal Probate Registry (Non-Contentious Business) Order, 1946.

Dated the 5th day of March, 1946.

Jowitt, C.

We concur. *Merriman*, P.
G. St. C. Pilcher.

* S.R. & O. 1940 (No. 1672) I, p. 1004.
† S.R. & O. 1940 (No. 1861) I, p. 1005.
‡ S.R. & O. 1940 (No. 1972) I, p. 805.
§ S.R. & O. 1942 (No. 2093) I, p. 805.
‖ S.R. & O. 1943 (No. 215) I, p. 935.

NOTES AND NEWS

Honours and Appointments

The King has approved a recommendation of the Home Secretary, that Mr. THEODORE FRANCIS TURNER, K.C., be appointed Recorder of Rochester in succession to Mr. Laurence Austin Byrne. Mr. Turner was called by the Inner Temple in 1924, and took Silk in 1943.

Mr. L. M. FRIEND, Registrar of the Clerkenwell County Court, has been appointed in addition Registrar of the Barnet County Court.

Mr. B. G. NICHOLS, Registrar of Edmonton County Court, has been appointed in addition Registrar of Bow County Court.

Mr. GEORGE GILLESPIE BAKER has been appointed Recorder of Bridgnorth in succession to Mr. WILLIAM FIELD HUNT, appointed Recorder of Newcastle-under-Lyme. Mr. Baker was called by the Middle Temple in 1932, and Mr. Hunt by the Inner Temple in 1925.

Mr. T. R. FITZWALTER BUTLER has been appointed prosecuting counsel to the Post Office on the Midland Circuit and Mr. G. N. BLACK on the North-Eastern Circuit. Mr. Fitzwalter Butler was called by the Inner Temple in 1921, and Mr. G. N. Black by the Middle Temple in 1929.

Mr. J. A. CHATTERTON, Deputy Clerk of Oxfordshire County Council and Deputy Clerk of the Peace for Oxfordshire, has been appointed Clerk to the Leicestershire County Council and Clerk of the Peace, as from July next. He was admitted in 1929.

Mr. J. P. ASPDEN, solicitor and Deputy Town Clerk of Warrington, has been appointed Town Clerk of Warrington. He was admitted in 1935.

The following have been elected Masters of the Bench of the Middle Temple: Mr. F. E. PRITCHARD, K.C., Mr. L. F. HEALD, K.C., Mr. R. E. GETHING and Mr. A. SAFFORD.

Sir Geoffrey Vickers, V.C., lately Director-General of the Economic Advisory Branch of the Foreign Office, member of the London Passenger Transport Board, and partner in the firm of Messrs. Slaughter & May, solicitors, has been appointed a member of the London Regional Planning Committee.

At the monthly meeting of the directors of the Solicitors' Benevolent Association, held on the 6th March, 1946, grants amounting to £1,690 were made to twenty-three beneficiaries.

Wills and Bequests

Mr. P. Butlin, Deputy Recorder of Salford, left £10,762, with net personalty £9,861.

Mr. T. K. Greenwood, retired solicitor, of Bradford, left £13,752, with net personalty £12,349.

His Honour James Willoughby Jardine, K.C., of Sloane Gardens, S.W.1, left £63,937, with net personalty £62,640.

RECENT LEGISLATION

STATUTORY RULES AND ORDERS, 1946

No. 264. **Civilian Clothing** Order. Feb. 27.
No. 250. **Education,** England and Wales. Reports to Local Authorities (Records) Regulations. Feb. 18.
No. 255. **Emergency Laws** (Transitional Provisions) (Colonies, etc.) Order in Council. Feb. 19.
No. 259. **Factories.** Patent Fuel Manufacture (Health and Welfare) (Revocation) Order. Feb 25.
No. 258. Factories. Patent Fuel Manufacture (Health and Welfare) Special Regulations. Feb. 25.
No. 270. **Police Regulations.** Feb. 22.
No. 286/S.9. Police (Scotland) Regulations. Feb. 22.
No. 242. **Wages Councils.** Rope, Twine and Net Wages Council (Great Britain) Wages Regulation (Holidays) Order. (R. 84.) Feb. 27.
No. 202/L.1. **War Damage** (Valuation Appeals and References) Rules. Feb. 21.

WAR OFFICE

Regulations for the Trial of War Criminals (Special Army Order No. 81, 1945). Amendments No. 3 (Special Army Order No. 24). Feb. 28, 1946.

[Any of the above may be obtained from the Publishing Department S.L.S.S., Ltd., 88/90, Chancery Lane, London, W.C.2]

COURT PAPERS

SUPREME COURT OF JUDICATURE

HILARY SITTINGS, 1946

COURT OF APPEAL AND HIGH COURT OF JUSTICE—CHANCERY DIVISION

ROTA OF REGISTRARS IN ATTENDANCE ON

Date.	Emergency Rota.	Appeal Court I.	Mr. Justice Uthwatt.
Mon., Mar. 18	Mr. Blaker	Mr. Hay	Mr. Farr
Tues., ,, 19	Andrews	Farr	Blaker
Wed., ,, 20	Jones	Blaker	Andrews
Thurs., ,, 21	Reader	Andrews	Jones
Fri., ,, 22	Hay	Jones	Reader
Sat., ,, 23	Farr	Reader	Hay

Date.	Group A. Mr. Justice Cohen. *Witness.*	Mr. Justice Vaisey. *Non-Witness.*	Group B. Mr. Justice Evershed. *Non-Witness.*	Mr. Justice Romer. *Witness*
Mon. Mar. 18	Mr. Jones	Mr. Reader	Mr. Andrews	Mr. Blaker
Tues., ,, 19	Reader	Hay	Jones	Andrews
Wed., ,, 20	Hay	Farr	Reader	Jones
Thurs., ,, 21	Farr	Blaker	Hay	Reader
Fri., ,, 22	Blaker	Andrews	Farr	Hay
Sat., ,, 23	Andrews	Jones	Blaker	Farr